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Smith v. Treasure Valley Seed Appellant's Brief 1 Dckt. 42596

IN THE SUPREME COURT OF THE STATE OF IDAHO

VICTORIA H. SMITH, by and through her attorney in fact, Vernon K. Smith, by and through his Durable and Irrevocable Power of Attorney, limited liability company,

Plaintiff-Appellant-Cross Respondent,

vs.

TREASURE VALLEY SEED COMPANY, LLC, and Don Tolmie in his individual capacity, and as an owner, representative and authorized agent of Treasure Valley Seed Co., LLC

Defendants-Respondents-Cross Appellants.

SC Docket No. 42596-2014

Case No. CV OC 1322179

APPELLANT'S AMENDED OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal presents the issue over the award of attorney fees and costs awarded to the Defendant(s)-Respondent(s) upon the dismissal of the Complaint filed by the Plaintiff-Appellant, awarded to them upon the basis they were either the prevailing parties under Rule 54, I.R.C.P. and/or entitled to fees and costs under §12-121, *Idaho Code,* as it was suggested in the proposed judgment,, though stricken from the "Judgment" by the Court when entered on August 28, 2014, (Cl. R. pp. 199-201), which "Judgment" followed months after the Court's entry of the "Judgment Dismissing Case" (Cl. R. pp.163-64) on April 4, 2014. The Judgment Dismissing Case pronounced IT IS SO ORDERED the above case is dismissed without prejudice, subject to the Court's retaining jurisdiction to rule on any timely filed request for costs and attorney fees. (Cl. R. pp. 163-164).

The action filed by Plaintiff-Appellant was dismissed by the District Court upon the belief that Plaintiff, Victoria H, Smith, could no longer be the "real party in interest" in the action, as she had become deceased previous to filing the action, and the power of attorney utilized by her son, Vernon K. Smith, to file the action (being the sole heir of Victoria H. Smith), had filed the action in her behalf, through the use of his durable and irrevocable power of attorney, which had terminated and became void under the Uniform Power of Attorney Act, §15-12-110, *Idaho Code,* upon the demise of the Plaintiff, and as a consequence of that termination, there was no "real party in interest" currently named to pursue the controversy, as such a "real Party" must exist under Rule 17(a) I.R.C.P..

The District Court then entered its "Judgment" (Cl. R. pp.199-201) on August 28, 2014, awarding attorney fees and costs of $15,826.50, together with post judgment interest as of the date of the judgment at 5.125% interest, as fixed by §28-22-104(2), *Idaho Code.*

B. COURSE OF PROCEEDINGS BELOW

This action was commenced on December 13, 2013 (Cl. R. p. 5-19), two days before the statute of limitations would take effect. It was filed naming Victoria H. Smith as Plaintiff, by and through her attorney in fact, Vernon K. Smith, through his durable and irrevocable power of attorney, as the agreement Vernon K. Smith (hereafter referred to, at times, as "Smith") had entered into with the Defendants was done with that power of attorney in 2008, and it was thought appropriate that authority and capacity should be carried forward into that pleading, subject to any needed amendment or substitution if required, all of which was done for the sake of continuity of the relationships. A Notice of Appearance was filed by Defendants'-Respondents' counsel on January 27, 2014 (Cl. R. pp. 34-35), and the Answer, with Counterclaims and Demand for Jury Trial, was filed on behalf of Defendant, Treasure Valley Seed Company, LLC, on January 28, 2014 (Cl. R. pp. 36-108), and the Answer and Demand for Jury Trial was also filed on behalf of Don Tolmie on January 28, 2014 as well (Cl. R. pp. 109-114). No defense was ever asserted by these Defendants regarding whether the Plaintiff, Victoria H. Smith, was or was not the "real party in interest", or whether the use of the power of attorney to file the action in the first place was outside the scope of any valid agency or representative capacity to initiate suit under the name of the Decedent. Victoria H. Smith had died on September 11, 2013, three months before the case was filed, but the original transaction with Treasure Valley Seed had been negotiated and entered into by Smith, which was also in behalf of Victoria H. Smith, that began with the crop season to grow the lima beans in 2007, and thereafter it was Mr. Smith who negotiated the settlement and sale of the lima beans that had

been produced, which included the use of the same power of attorney, with Don Tolmie, who was acting on behalf of Treasure Valley Seed, which sale's agreement was concluded on December 15, 2008. All of the relevant activity that had transpired in the creation of the agreement, and all relevant factors that gave rise to the cause of action, were commenced and completed during the life of Victoria H. Smith, during the enforceability of the power of attorney, and it included that capacity the action was pursued, as that was the way in which the facts had begun.

The Defendants filed, along with their responsive pleadings, their Motion for Change of Venue, from Ada County to Canyon County, (Cl. R. pp.115-127), and on February 12, 2014, a Notice of Hearing was filed with the Court, setting the hearing on that motion for March 24, 2014 (Cl. R. pp.137-138), but no hearing was thereafter held, as the District Court issued its scheduling Order on February 10, 2014 (Cl. R. pp. 130-136), setting the conference to occur on March 3, 2014 at 4:45 p.m., during which Conference (held March 3, 2014), the Court raised the issue addressing the demise of Victoria H. Smith, confirming with Plaintiff's counsel that she had, in fact, died on September 11, 2013, as the Court was aware of that fact, and the Court then proposed the matter be addressed upon a motion to dismiss, which the Defendants then filed their Motion to Dismiss on March 18, 2014 (Cl. R. pp.143-149), and lodged their Memorandum supporting their Motion on March 18, 2014 (Cl. R. pp. 150-153). The Memorandum lodged with the Court (as identified in the Clerk's Record) was received and filed incomplete, but represents what the Court received to support Defendants' position in the matter.

In response to Defendants' Motion to Dismiss, Plaintiff's counsel filed the Response and Objection To Defendants Motion to Dismiss And filed a Motion To Substitute Parties with Vernon K. Smith, As the Real Party In Interest on April 1, 2014 (Cl. R. pp.154-159), and filed a Motion For

Joinder Of a Real Party In Interest And Permissive Joinder Of Parties, Pursuant to Rules 17(a) and 20(a) *I.R.C.P.* on April 1, 2014 (Cl. R. pp.160-162).

On April 4, 2014, the District Court dismissed the case, entering the Order entitled: Judgment Dismissing Case, stating "the above case is dismissed without prejudice subject to the Court's retaining jurisdiction to rule on any timely filed request for costs and attorney fees. IT IS SO ORDERED" (Cl. R. pp. 163-164).

On April 17, 2014, Defendants then filed Defendant's Memorandum of Costs (Cl. R. pp. 165-169), and on that same date filed the Affidavit of Richard B. Eismann, filed in support Of the Memorandum of Costs (Cl. R. pp. 170-188). On April 30, 2014, Plaintiff's counsel filed the Response and Objection To Defendants' Request For Attorney Fees (Cl. R. pp. 189-191). Hearing upon the Objection to Defendants' motion for attorney fees and costs was initially scheduled for July 9, 2014, as identified in the Notice of Hearing filed June 23, 2014 (Cl. R. pp. 192-193), but pursuant to motion to vacate due to scheduling conflicts with a lengthy trial, filed June 30, 2014, (Cl. R. pp. 194-195), the hearing was re-scheduled and held on July 28, 2014, as reflected in the Amended Notice of Hearing filed July 3. 2014 (Cl. R. pp. 197-198). Following that hearing, the District Court filed the "Judgment" on August 28, 2014 (Cl. R. pp. 199-201), therein awarding Defendants costs and attorney fees against Vernon K. Smith and the Plaintiff, jointly and severly [sic], in the sum of $15,826.50, together with interest thereafter at 5.125%.

An appeal was thereafter taken of the "judgment" of August 28, 2014 (Cl. R. pp. 202-205) to the Idaho Supreme Court on October 8, 2014, as the April 4, 2014 "Judgment Dismissing Case was viewed to be an interlocutory order as its language so suggested, and thereafter a cross-appeal was filed with the Court on October 23, 2014, wherein Defendants-Cross-Appellants were seeking further attorney fees in the appeal (Cl. R. pp. 206-208).

C. STATEMENT OF FACTS

This case was filed to obtain payment due under the lima bean sale's transaction entered into with Treasure Seed Company, LLC, under the purchase arrangements made with Smith and Don Tolmie, the agent and representative of Treasure Valley Seed. The sale occurred on December 15, 2008. The case was filed by Smith, pursuant to his durable and irrevocable power of attorney, through his legal representation as counsel for his mother, Victoria H. Smith, sought recovery upon the written purchase contract of December 15, 2008, or in the alternative recovery upon an implied contract in fact or implied in law. The power of attorney was thought appropriate to represent the existence of the Agreement and authority to file suit, as the transaction was entered into with that authority in 2008, and Smith, who was the sole heir of her estate, could be substituted in thereafter, if necessary, or initiate the formation of an estate, should probate become necessary, as Victoria H. Smith had died three months earlier on September11, 2013.

Victoria H. Smith had been historically engaged in farming operations in Ada County, Idaho, through her son, Vernon K. Smith, raising agricultural crops and commodities, which came to include baby lima beans, all of which was being pursued through the efforts and activities of her son, who at times also acted as her attorney in fact, and it was he who had arranged to raise lima beans with Treasure Valley Seed Company, LLC for the growing season of 2007.

Vernon K. Smith, as her son and attorney in fact, was acting as Plaintiff's attorney in fact pursuant to his durable and irrevocable power of attorney issued to him in 1999, and transacted the arrangements with Treasure Valley Seed Company, LLC, in 2007, along with his activities in the farming operations, that included the marketing, merchandising and selling of the agricultural commodities, including these baby lima beans he had grown in the year 2007, and were then to be purchased by and paid for by Treasure Valley Seed Company, LLC.

Treasure Valley Seed Company, LLC, (hereafter Treasure Valley) is a seed business company located in Homedale Idaho. Don Tolmie was their authorized representative, agent, and represented to be a participating owner of Treasure Valley, and he agreed to act as the authorized field representative for the Company on the Smith farm, and Mr. Tolmie made various inducements, promises and representations, and later made the sale's arrangements with Smith.

On December 15, 2008, Don Tolmie contracted to purchase all of the 2007 crop of baby lima beans, which consisted of a net weight of 124,552 lbs. (1,245.52 one hundred weight (cwt)), at a net purchase price of $0.55 per pound ($55.00 per hundred weight (cwt)), for a total net purchase price of $68,503.60.

It was specifically agreed no storage would be charged for any period of time the beans were being stored by Treasure Valley, (stated in the written purchase agreement) and no further costs or expenses would be incurred or deducted from that net purchase price, as the agreement was a net purchase and sale price of $68,503.60 for the lima beans.

The Purchase and Sale Agreement, identified as Order Number 4054, referring to Plaintiff as Customer Number 37470, was created and is attached to the Complaint filed by Smith, along with a copy of the envelope in which the Agreement was delivered to Smith at the farm. The calculated clean weight of the baby lima beans, generated by Treasure Valley after their cleaning process was completed, was attached to the pleadings.

Treasure Valley took physical possession of the lima beans at the conclusion of the harvest of the beans in 2007, and thereafter exercised the exclusive dominion and control over the beans, but failed to pay the purchase price agreed to, and refused to surrender the beans back to Smith, or make any other acceptable payment to Smith for the agreed purchase price.

Following the sale's transaction of December 15, 2008, Smith wrote to Don Tolmie at Treasure Valley, on December 26, 2008, confirming certain conversations, and verifying the agreement they had reached on December 15, 2008, and expressed concerns about the performance that was to follow the sale of the lima beans, as Mr. Tolmie had not delivered confirmation of his represented "sale" of the beans to the third-party, the basis upon which he had used to agree to $55.00 cwt insteasd of the $75.00 cwt value that Smith believed was more like the true market value at the time, and Smith was concerned Tolmie was deceiving him about the true value, as he had failed to produce the "sale contract to the third party, as he had promised he would do, and instead it was beginning to appear that Treasure Valley was still holding the beans in their warehouse in Homedale, Idaho, having deceived Smith about his sale arrangements. A copy of Smith's letter was attached to the Complaint.

Don Tolmie and Treasure Valley failed and refused to disclose any sales to the third party; failed to pay as agreed, yet continued to retain the possession of the beans, and continued their control over the entire quantity of beans, and the commodity "supposedly" remained in storage with Treasure Valley, having been taken there under the direction of Don Tolmie when taken from the farm in the fall of 2007, upon his representations and commitments to do that which he said he would do as identified in the letter of December 26, 2008, attached to the Complaint.

Consequently, Treasure Valley failed to pay under the terms of the agreement, and remain indebted to Smith for the principal sum of $68,503.60, together with accrued interest after December 15, 2008, for which reason suit was finally filed by Smith on December 13, 2013, on behalf of Victoria H. Smith, who had died 3 months earlier on September 11, 2013. Because the Power of Attorney was the vehicle used in forming the transaction with Treasure Valley in 2007, and the subsequent sale's agreement in 2008, it was deemed to be appropriate to continue on with

that basis that had created the relationship between Smith and Don Tolmie, and that capacity could be utilized in the pleadings, even after the death of Victoria to reflect the formation of their relationship, as no estate had been opened for probate, and no legitimate excuse existed (from Plaintiff's perspective, to delay recovery and avoid further controversy, and a subsequent amendment or substitution could take place, if required, if the controversy continued, and with Mr. Eismann as counsel for Treasure Valley, that would prove to evolve into controversy, and a need to substitute may be required, as that proved to be the case. It was believed that if the obligation was challenged, and a controversy required litigation upon the merits, there could then be a substitution of the Party Plaintiff, if found necessary, either with Smith, individually, as he was the sole heir, or amend to include their entity VHS Properties, LLC, in which both were members, and had acquired Victoria's interests, and if required or preferred by the Court, file a probate and open an estate, and substitute the estate, should that be declared the preferred method to establish a "real party in interest" as required, and as allowed, by the Rules of Civil Procedure, Rules 17 and 20, I.R.C.P...

D. STANDARD OF REVIEW

The issues raised in this appeal concerns the award of costs and attorney fees by the lower Court upon the dismissal of the action by the District Court for failure to have the real party in interest identified in the initial complaint. This matter appears to be addressed and reviewed as a combination of free review and abuse of discretion, upon appeal. When this Appellate Court reviews the decision of a district court that concerns the proper application of procedural rules, that allows **free review**. The Court has stated: We exercise free review over questions regarding the application of procedural rules. *Zenner v. Holcomb*, 147 Idaho 444, 450, 210 P.3d 552, 558 (2009) (quoting *Blaser v. Cameron*, 116 Idaho 453, 455, 776 P.2d 462, 464 (Ct. App. 1989)). The issue and calculation of a reasonable attorney fee is a matter of the court's discretion. *Grease*

Spot, Inc. v. Harnes, 148 Idaho 582, 586, 226 P.3d 524, 528 (2010) (citing I.R.C.P. 54(e)(3); *Johannsen v. Utterbeck*, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008)). When deciding whether a trial court abused its discretion, the standard is "whether the court perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and reached its decision by an exercise of reason." *Read v. Harvey*, 147 Idaho 364, 369, 209 P.3d 661, 666 (2009) (citing *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)). In *Idaho Military Historical Society v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014), the Court stated: An award of attorney fees pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1) will not be disturbed absent an abuse of discretion. *See Savage v. Lateral Ditch Water Users Ass'n v. Pulley,* 125 Idaho 237, 250, 869 P.2d 554, 567 (1993). The district court's determination as to whether an action was brought or defended frivolously will not be disturbed absent an abuse of discretion. *Anderson v. Ethington,* 103 Idaho 658, 660, 651 P.2d 923, 925 (1981). When an exercise of discretion is involved, this Court conducts a three-step inquiry: (1) whether the trial court properly perceived the issue as one of discretion; (2) whether that court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason. *Sun Valley Shopping Center v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). 156 Idaho at 629, 329 P.3d at 1077.

A court's determination to make an award of attorney fees to a prevailing party under I.C. § 12-121 is entirely discretionary. *Webster v. Hoopes*, 126 Idaho 96, 100, 878 P.2d 795, 799 (Ct.App.1994). In *Ross v. Ross*, 142 Idaho 536, 129 P.3d 1285 (Ct.App.2006) the Court declared the following applicable standard for an award of attorney fees under I.C. § 12-121, wherein the Court stated:

[W]hen deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, ***the entire course of the litigation must be taken into account***. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 434, 95 P.3d 34, 52 (2004); *McGrew*, 139 Idaho at 562, 82 P.3d at 844. If there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Vendelin*, 140 Idaho at 434, 95 P.3d at 52; *Nampa & Meridian Irr. Dist.*, 135 Idaho at 524-25, 20 P.3d at 708-09. 142 Idaho at 539, 129 P.3d at 1288 (emphasis added). In other words, if there is at least one legitimate issue presented in this case, attorney fees cannot be awarded under I.C. § 12-121 even though the losing party may have asserted other factual or legal claims that are allegedly frivolous, unreasonable, or without adequate legal or factual foundation. *McGrew v. McGrew,* 139 Idaho 551,562, 82 P.3d 833, 844 (2003).

In addition, when making an award of attorney fees under I.C. § 12-121 ***the court is required by Rule 54(e)(2) to make written findings stating the basis and reasons for the award of attorney fees under that statute. Those findings made by the court in support of an award of attorney fees under I.C. § 12-121 must be supported by the record as supporting the court's determination that the entire action was pursued frivolously.*** *See Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 799, 41 P..3d 220, 227 (2002). (Emphasis added).

In *Wing v. Amalgamated Sugar Co.,* 106 Idaho 905, 684 P.2d 307 (Ct.App.1984) the Court stated the standard (and thusly the standard of review) upon which an award of attorney fees under I.C. § 12-121 was to be based:

A misperception of law ***or of one's interest under the law is not, by itself, unreasonable conduct.*** If it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing party under I.C. § 12-121. Rather, the question must be whether the position adopted by the owner was not only incorrect but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation. 106 Idaho at 911, 684 P.2d at 313. *See also, Herbst v. Bothof Dairies, Inc.,* 110 Idaho 971, 975, 719 P.2d 1231, 1235 (Ct.App.1986) ("The standard for determining whether such an award should be made is not whether the ***position*** urged by the nonprevailing party is ultimately found to be wrong, but whether it is so plainly fallacious as to be frivolous."); and *Gulf Chemical Employees Federal Credit Union v. Williams*, 107 Idaho 890, 894, 693 P.2d 1092, 1096 (Ct.App.1984) ("[A] claim is not necessarily frivolous or lacking in merit simply because it ultimately fails as a matter of law. ***Rather, the question is whether the claim when made and pursued,*** is so plainly fallacious that it can be termed frivolous, unreasonable or without foundation."). (Emphasis added).

In Walker v. Boozer, 140 Idaho 451, 95 P.3d 69 (2004) the Court stated:

The district court cited I.R.C.P. 54(e)(1) and I.C. § 12-121 as the basis for awarding attorney fees incurred by the Quaker Haven Owners in defending against the Boozers' Motion to Alter or Amend the Judgment. Pursuant to I.R.C.P. 54(e)(1), attorney fees may be granted under I.C. § 12-121 only when a court finds from the facts presented to it, "that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1) (emphasis added). ***The denial of a motion does not fall within the scope of the authority cited by the district court because a single motion does not comprise an entire case. In other words, I.C. § 12-121 applies to cases as a whole and not to individual motions***. *See Turner v. Willis,* 119 Idaho 1023, 1025, 812 P.2d 737, 739 (1991); *Mgmt. Catalysts v. Turbo W. Corpac, Inc.*, 119 Idaho 626, 630, 809 P.2d 487, 491 (1991); *Magic Valley Radiology Assoc. P.A. v. Prof'l Bus. Servs., Inc.,* 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991). Therefore, the award of attorney fees is reversed because the authority cited by the district court does not support such an award.140 Idaho at 457, 95 P.3d at 75 (emphasis added).

As a general rule, a court cannot make a sua sponte award of attorney fees without declaring the **statutory basis for that award** as required in *Bingham v. Montane Resource Associates*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999), and **written findings** must be entered as cited above. "The question of a trial court's compliance with the rules of civil procedure relating to the recovery of attorney fees or costs is one of law upon which an appellate court exercises **free review**." *J.R. Simplot Co. v. Chemetics International, Inc.,* 130 Idaho 255, 257, 939 P.2d 574, 576 (1997) (citing to *Harney v. Weatherby*, 116 Idaho 904, 906-07, 781 P.2d 241, 243-44 (Ct. App.1989)).

Due process applies to the award of costs and attorney fees. *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 120 S.Ct. 1579, 146 L.Ed.2d 530 (2000), as cited in *Haw v. Idaho State Board of Medicine,* 140 Idaho 152, 159, 90 P.3d 902, 909 (2004). Due process protects both the right to object to, and to challenge the basis upon which an award of attorney's fees is made, in addition to the amount of that award. *Bingham v. Montane Resource Associates,* 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999).

When an award of attorney fees is made under I.C. § 12-121, which is believed to be the District Court's intention here (as also perceived by the Defendants), the court is required by I.R.C.P. 54(e)(2) ***to make a "written" finding, either in the award itself or in a separate document, that states the basis and reasons for the court's award under that statute.*** Neither the August 28, 2014 "Judgment" for Attorney Fees and Costs, nor the April 4, 2014 "Judgment Dismissing Case", nor any separate document, has ever been entered or filed to provide a "written finding" as to the basis and reasons for awarding §12-121 attorney fees that satisfies the requirement of I.R.C.P. 54(e)(2). The Idaho Rules of Civil Procedure are interpreted by use of the same rules of statutory construction which provide that meaning should be given to every word, clause, and sentence that is contained within any rule. *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 900, 188 P.3d 834, 842 (2008). The requirement set out in Rule 54(e)(2) that the court is to make a separate "written" finding must be contained in a document for review. Those written findings, once made and entered in a case, must then be supported by the record as upholding the court's determination that the ***entire action*** was pursued frivolously. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 799, 41 P.3d 220, 227 (2001). No such written finding was ever made in this case, and even the perception to that effect, as announced by the Defendants in their proposed "Judgment", were stricken by the Court in the prepared "judgment" presented to it for execution.

In *Ross v. Ross*, 142 Idaho 536, 129 P.3d 1285 (Ct.App.2006), the Idaho Court of Appeals emphatically declared the applicable **standard** for an award of attorney fees under I.C. § 12-121:[W]hen deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, ***the entire course of the litigation must be taken into account.*** *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 434, 95 P.3d 34, 52 (2004); *McGrew,* 139 Idaho at

562, 82 P.3d at 844. (Emphasis added). If there ***is a legitimate, triable issue of fact***, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Vendelin,* 140 Idaho at 434, 95 P.3d at 52; *Nampa & Meridian Irr. Dist.,* 135 Idaho at 524-25, 20 P.3d at 708-09. 142 Idaho at 539, 129 P.3d at 1288 (emphasis added). In other words, if there is at least one legitimate issue that was presented in the case, then attorney fees cannot be awarded under I.C. § 12-121 even though the losing party may have asserted other factual or legal claims that are allegedly frivolous, unreasonable, or without adequate legal or factual foundation. *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).

II.

ISSUES PRESENTED ON APPEAL

1. Did the District Court err and abuse its discretion in awarding attorney fees and costs to the defendants, either as a prevailing party or apparently under §12-121, *Idaho Code?*

III.

ARGUMENT

ISSUE 1

The District Court erred and abused its discretion in awarding attorney fees and costs to the defendants, whether under a prevailing party theory or under §12-121.

As stated above in the Standard of Review section, when a Court awards attorney fees under §12-121, *Idaho Code*, it must first enter written findings to support its decision for any such award. A reporters is not a substitute for the entry of **written findings** in the record, as the discussion between the court and counsel, during argument presented on the motions, cannot constitute an analysis under that statutory provisions for attorney fees, as it is insufficient to support the record ,

as it must be contained in written findings filed of record in the case, before any entry of such an award fees to be ordered in the judgment that was later entered by the Court on August 28, 2014. There has been no memorandum filed by the Court to identify any of its decisions entered by the Court in this case on any of the motion(s) filed and argued by the parties, so there is no analysis, findings, or factual basis contained in a Clerk's Record to address the reasoning of the Court, either with respect to the dismissal of the case, or the award of such fees and costs to the Defendants. Furthermore, any misperception of law or **of one's interest under the law** is not, by itself, unreasonable conduct. If it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing party under I.C. § 12-121. The issue of a real party in interest had become raised, and Rule 17(a) addresses how that is to be resolved. The District Court failed to apply the Rule correctly, and furthermore, violated the Rule, as the Court dismissed the case when specifically precluded from doing so, without first giving reasonable opportunity to substitute in a real party in interest, of which several alternatives were available for consideration,, including the individual who came to hold and control all interests of a proper Party Plaintiff, either individually, who held an interest also in the beans, or as a personal representative in an estate to be opened, or as a member of the LLC that came to hold interests as well by the transfers made in 2012. A proper substitution could have, and would have been made, if allowed, and that factor does not constitute a basis for entry of a fee award as a consequence of seeking the proper substitution under the Rules.

Additionally, as stated above, ***the entire course of the litigation must be taken into account.*** *See Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 434, 95 P.3d 34, 52 (2004); *McGrew,* 139 Idaho at 562, 82 P.3d at 844. (emphasis added). If there ***is a legitimate, triable issue of fact***, then attorney fees may not be awarded under §12-121, *Idaho Code*, even though

the losing party has asserted factual or legal claims that may be or in fact are frivolous, unreasonable, or without foundation. Again *see Vendelin,* 140 Idaho at 434, 95 P.3d at 52; *Nampa & Meridian Irr. Dist.*, 135 Idaho at 524-25, 20 P.3d at 708-09. 142 Idaho at 539, 129 P.3d at 1288 (emphasis added). If there is one legitimate issue that was presented in the case, then attorney fees cannot be awarded under §12-121, *Idaho Code*, even though the losing party may have asserted other factual or legal claims that are allegedly frivolous, unreasonable, or without adequate legal or factual foundation. *See McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). Those required **written findings** don't exist in our case, and if they did, they would be a reflection of an abuse of discretion and violation of the Rules of Procedure on the subject of real party(s) in interest. When such written findings are made, they must in turn be supported by the record as upholding the court's determination that the ***entire action*** was pursued frivolously. *Wait v. Leavell Cattle, Inc.,* 136 Idaho 792, 799, 41 P.3d 220, 227 (2001). Not only were no such written findings ever made in this case, but the action was not even allowed to be pursued by the real party or parties in interest, as the Court truncated the intent of the Procedural Rules that allow substitution and joinder, and specifically prohibit and decision to dismiss the action, without affording the reasonable and necessary opportunity to determine the proper means and method of substitution. The Defendants' counsel, who drafted the "Judgment" to be entered on attorney fees and costs, believed the Court's basis for such an award was under §12-121, *Idaho Code*, but even that passing reference was stricken by the Court in the prepared "judgment" presented to the Court by the Defendants for execution.

III.

CONCLUSION

This case should be remanded to the District Court, with instructions to vacate the judgment of August 28, 2014, awarding attorney fees and costs to the Defendants. To allow the judgment to stand serves only to add insult to the injury that Plaintiff is unable to redress a valid and meritorious claim against these Defendants, who refuse to return the beans they haven't paid for as required under the agreement, and seek to appropriate the beans by taking advantage of the death of Victoria H. Smith and the passage of time.

Respectfully submitted this 22nd day of December, 2015.

Vernon K. Smith
Attorney for Plaintiff(s) –Appellant(s)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 22nd day of December, 2015 two true and correct copies of the foregoing APPELLANT'S AMENDED OPENING BRIEF were served upon the following:

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___ U.S. Mail
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